FINANCIAL AND CONSUMER SERVICES TRIBUNAL
TRIBUNAL DES SERVICES FINANCIERS ET DES SERVICES AUX CONSOMMATEURS

Citation: *New Brunswick (Financial and Consumer Services Commission) v. Pierre Emond and Armel Drapeau*, 2016 NBFCST 8

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *SECURITIES ACT*, S.N.B. 2004, c. S-5.5

Date: 2016-08-10
Docket: 2300-E1

BETWEEN:

Financial and Consumer Services Commission,

Applicant,

-and-

Pierre Emond and Armel Drapeau,

Respondents.

REASONS FOR DECISION ON MOTIONS

Restriction on publication: This Decision has been anonymized to comply with the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6.

PANEL:	Enrico A. Scichilone, Panel Chair Jean LeBlanc, Panel Member Gerry Legere, Panel Member
DATE OF HEARING:	May 2, 2016
WRITTEN REASONS:	August 10, 2016
APPEARANCES:	Brian Maude for the Financial and Consumer Services Commission; I. Gérald Lévesque for Armel Drapeau; Pierre Emond, in his own capacity, appearing by telephone

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I. OVERVIEW

[1] The hearing on the merits in this matter was to begin on May 2, 2016 and continue until May 6, 2016. On April 22, 2016, the Registrar of the Financial and Consumer Services Tribunal (the Tribunal) advised the parties that we intended to address the delay in these proceedings as a preliminary matter at the start of the hearing on the merits.

[2] The Registrar of the Tribunal informed the parties to be prepared to address the decisions of *MacPhee v. Barristers' Society (New Brunswick)*(1983), 5 Admin L.R. 240 (N.B.Q.B.), *Bennett v. British Columbia Securities Commission,* [1992] 18 B.C.A.C. 191 and *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44.

[3] On April 27, 2016, the Registrar of the Tribunal requested that the parties advise her if they had any other preliminary matters as we intended to deal with all preliminary matters on May 2, 2016.

[4] On April 27, 2016, the Registrar of the Tribunal informed the parties that the hearing on the merits was adjourned given that the determination of the issue of delay could potentially put an end to the proceeding.

[5] The following preliminary matters were raised:

a) The question of delay raised by the Tribunal,

b) Mr. Drapeau's request for a stay of these proceedings due to unreasonable delay on the basis of sections 7 and 11 of the *Canadian Charter of Rights of Freedoms*, and

c) The Financial and Consumer Services Commission's [the Commission] request that the Affidavits of Ed LeBlanc be admitted into evidence at the hearing on the merits to supplement the testimony of Ed LeBlanc.

[6] We decided the issue of the admissibility of the Affidavits of Ed LeBlanc in our June 28, 2016 Order.

[7] On June 3, 2016, a month after the hearing of the preliminary matters, the Registrar of the Tribunal advised the parties that we wanted them to consider five additional decisions: *Misra v. College of Physicians & Surgeons (Saskatchewan)*(1988), 70 Sask. R. 116; *Stinchcombe v. Law Society (Alberta)* 2002 ABCA 106; *Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [1994] B.C.J. No. 2037; *Kodellas v. Saskatchewan (Human Rights Commission)* (1989), 77 Sask. R. 94; and *New Brunswick Council of B.A.C. v. Advanced Masonry Ltd.*, 2012 CarswellNB 74. We provided the parties until June 10, 2016 to provide their additional submissions.

[8] The Commission and Mr. Drapeau provided additional submissions.

[9] For the reasons that follow, we conclude that these proceedings must be dismissed. In other words, this proceeding is concluded.

II. ISSUES

[10] Should a permanent stay of these proceedings be ordered due to

a) inordinate delay compromising the fairness of the hearing;

b) the doctrine of abuse of process; or

c) unreasonable delay on the basis of sections 7 and 11 of the *Canadian Charter of Rights and Freedoms*?

III. FACTS

[11] Between 2006 and 2008, Pierre Emond lived in Edmundston, New Brunswick. He was not a registrant under the *Securities Act*, S.N.B. 2004, c. S-5.5 [*Securities Act*].

[12] During this same period, Armel Drapeau also lived in Edmundston and was a registered mutual fund dealer under the *Securities Act* with Investia Financial Services Inc. He had been a registrant since 1989.

[13] The New Brunswick Securities Commission (NBSC) existed from 2004 to June 30, 2013. On July 1, 2013, it was continued as the Financial and Consumer Services Commission (the Commission) and the adjudicative functions previously assumed by NBSC hearing panels were transferred to the Financial and Consumer Services Tribunal.

Alleged Conduct and Start of the Proceedings

[14] The Commission alleges that Pierre Emond and Armel Drapeau promoted and participated in an illegal distribution of securities issued by the Centre de traitement d'information de crédit (C.T.I.C.) Inc. [CTIC]. The Commission further alleges that Mr. Emond and Mr. Drapeau solicited investments in CTIC from the public, in the form of written loan agreements evidencing the indebtedness of CTIC to investors. The loans bore interest rates of between 12% and 14% per year. The Commission alleges that these written loan agreements were securities.

[15] The Commission also alleges that CTIC paid commissions to Mr. Emond and Mr. Drapeau, either directly or to a company designated by them, for their participation in securing investments in CTIC.

[16] The Commission alleges that between March 2006 and January 2008, Pierre Emond traded in securities of CTIC with 34 investors from New Brunswick who invested more than $3 million in the securities of CTIC. According to the Commission, the 34 investors each invested between $12 000 and $500 000.

[17] With regard to Armel Drapeau, the Commission alleges that between October 2006 and March 2008, Armel Drapeau traded in securities of CTIC with 21 New Brunswick investors who invested more than $1.8 million in the securities of CTIC. The 21 investors each invested between $5,000 and $450,000.

[18] The NBSC commenced its investigation into the actions of Pierre Emond and Armel Drapeau in 2006 or at the latest early 2007.

[19] On February 15, 2008, the NBSC obtained an undertaking from Pierre Emond to not trade in securities without its prior written authorization.

[20] On May 20, 2008, the NBSC obtained an undertaking from Armel Drapeau to not trade in the securities of CTIC.

[21] These undertakings are still in effect.

[22] The Commission further alleges that in December 2008 and January 2009, Armel Drapeau breached the undertaking by acting in furtherance of trades of CITCAP Groupe Financier Inc. (CITCAP) securities to five investors in New Brunswick. According to the Commission, the sole purpose of CITCAP was to remit the investments raised to CTIC. The investments totaled $570,000.

[23] This proceeding commenced on August 19, 2009 by the filing of a preliminary motion by Staff of the NBSC seeking temporary orders prohibiting Mr. Emond and Mr. Drapeau from prevailing themselves of the exemptions under New Brunswick securities law.

[24] A NBSC hearing panel issued the requested temporary Order on September 21, 2009. Mr. Emond and Mr. Drapeau consented to this Order. The temporary Order states that the NBSC's investigation is ongoing.

[25] Staff of the NBSC filed a Statement of Allegations against the Mr. Emond and Mr. Drapeau on June 24, 2010. The Statement of Allegations sets out the allegations of wrongdoing by Mr. Emond and Mr. Drapeau. The Statement of Allegations was amended on April 26, 2011 and December 6, 2012 in part to remove other respondents from these proceedings.

[26] The Second Amended Statement of Allegations alleges the following breaches by Pierre Emond:

a) He was not registered to trade in securities at the time of his participation in the CTIC distribution and therefore breached subsection 45 (a) of the *Securities Act*; and

b) He breached subsection 71(1) of the *Securities Act* as the CTIC distribution was not affected by prospectus or in reliance on, and in compliance with, any exemption from the prospectus requirement.

[27] As for Armel Drapeau, the Second Amended Statement of Allegations alleges that:

a) He breached subsection 45(a) of the *Securities Act* as his operations in relation to CTIC were not carried out under the aegis of *Investia,* his registered dealer;

b) He breached subsection 71(1) of the *Securities Act* as the CTIC distribution was not affected by prospectus or in reliance on, and in compliance with, any exemption from the prospectus requirement;

c) He misled Staff of the NBSC with respect to his involvement in the CITCAP sales, contrary to paragraph 179(2)(a) of the *Securities Act* when he stated that he was involved in the distribution to only one CITCAP investor;

d) In December 2008 and January 2009, he acted in furtherance of an illegal distribution of securities issued by CITCAP to five New Brunswick investors contrary to the Mutual Fund Dealers Association Rule 1.1.1 and subsection 45(a) and 180(a) of the *Securities Act* as this trading was not carried on for the account of and through the facilities of his registered dealer Investia;

e) The CITCAP distribution was purportedly made pursuant to the Offering Memorandum

exemption under section 2.9 of National Instrument 45-106 (NI 45-106), but a Report of Exempt Distribution was only filed with the NBSC in respect of one of the five trades; and

f) Armel Drapeau was paid, or was to be paid, a commission of 5% in connection with the CITCAP distribution, in contravention of section 2.9(6) of NI 45-106.

Development in the Proceedings

[28] On September 24, 2010, the Office of the Secretary of the NBCS issued a Notice of Pre-hearing Conference setting November 22, 2010 for a pre-hearing conference.

[29] Amongst other things at the pre-hearing conference, the hearing dates were chosen and on December 7, 2010, the Office of the Secretary of the NBSC issued a Notice of Hearing confirming the hearing dates of April 19-21, May 9-11 and May 16-17, 2011.

[30] Armel Drapeau filed his Response on March 15, 2011. In his Response, he denies the allegations and alleges that the NBSC hearing panel lacks impartiality or independence.

[31] On March 29, 2011, Armel Drapeau filed a motion seeking: (1) disclosure of certain documents; (2) justification for redactions in the Affidavits of Ed LeBlanc; (3) the dismissal of the allegations against him on the basis that the NBSC hearing panel lacks jurisdiction to hear the complaint resulting from its lack of impartiality and/or independence as required by the rules of natural justice or sections 7 and 11(d) of the *Charter of Rights and Freedoms*; and (4) the dismissal of the proceedings on the basis of estoppel.

[32] The motion was scheduled for April 21, 2011. However, the portion of the motion dealing with arguments under the *Canadian Charter of Rights and Freedoms* was severed from the remaining issues and scheduled to proceed on May 9, 2011.

[33] On April 8, 2011, a pre-motion conference was held in relation to Mr. Drapeau's motion.

[34] The motion proceeded on April 21, 2011.

[35] Given the motion, the April 19-21, 2011 hearing dates were cancelled and the hearing on the merits was scheduled to proceed on May 9-11 and 16-17, 2011.

[36] The NBSC hearing panel issued its decision in relation to disclosure on May 2, 2011 and rejected Mr. Drapeau's request for disclosure.

[37] The NBSC hearing panel issued its decision in relation to the informer privilege on May 6, 2011. The panel granted this motion. However, Mr. A, the informer, filed a motion seeking leave to appeal this decision to the Court of Appeal.

[38] On May 9, 2011, the NBSC hearing panel heard the motion in relation to its lack of impartiality or independence pursuant to the rules of natural justice and sections 7 and 11(b) of the *Charter.*

[39] On May 12, 2011, the hearing on the merits was adjourned to August 22-26, 2011, pending the outcome of Mr. A's leave to appeal motion to the Court of Appeal.

[40] On August 18, 2011, the NBSC hearing panel issued its decision rejecting Mr. Drapeau's argument of lack of impartiality or independence.

[41] On August 22, 2011, the hearing on the merits was again adjourned to await the outcome of Mr. A's appeal. The hearing was rescheduled to November 21-25 and December 19-22, 2011.

[42] On September 1, 2011, the Court of Appeal granted Mr. A leave to appeal the May 6, 2011 decision of the NBSC hearing panel.

[43] On October 12, 2011, the hearing on the merits was adjourned to further dates to be determined.

[44] On May 17, 2012, the Court of Appeal heard the appeal of the May 6, 2011 decision in relation to informer privilege. The Court of Appeal issued its decision on August 23, 2012 overturning the NBSC hearing panel's decision in relation to informer privilege.

[45] On October 1, 2012, the Office of the Secretary of the NBSC issued a Notice of Hearing setting January 8-10 and 15-17, 2013 for the hearing on the merits.

[46] On December 29, 2012, Mr. Emond and Staff of the NBSC concluded a Settlement Agreement, subject to the approval of the NBSC hearing panel. The settlement hearing was held on January 2, 2013 and the hearing panel rejected the proposed settlement.

[47] On January 2, 2013, the hearing on the merits was adjourned as Mr. Drapeau indicated that he would be filing a motion.

[48] Mr. Drapeau filed his motion on February 5, 2013 seeking the stay of the proceedings before the NBSC hearing panel pending the outcome of his civil proceedings against the NBSC. Mr. Drapeau argued that a reasonable member of the public would perceive that the NBSC hearing panel lacked impartiality given that he had commenced a legal action against the NSBC.

[49] Mr. Drapeau's motion was heard on April 17, 2013. Staff of the NBSC initially opposed Mr. Drapeau's motion. However, on August 7, 2013, Staff of the NBSC indicated that they no longer opposed Mr. Drapeau's motion for a temporary stay as the NBSC had commenced its own legal action against Mr. Emond and Mr. Drapeau.

[50] On August 27, 2013, the NBSC hearing panel issued an Order staying these proceedings for one year, following which the parties would provide a status update.

[51] Finally, on November 26, 2014, the Registrar of the Tribunal issued a Notice of Status Hearing setting December 15, 2014 for the status hearing on the stay of proceedings.

[52] On December 9, 2014, Mr. Drapeau requested an adjournment of the status hearing due to family health issues. Mr. Emond and the Commission consented to this request. We granted the adjournment on December 11, 2014. The parties were advised to provide their position on the stay by January 16, 2015.

[53] On December 19, 2014, Mr. Drapeau requested a further extension to provide his position on the stay.

He again cited ongoing family health issues which would take some time to resolve and requested a further extension. The Commission and Mr. Emond again consented to this request. We granted this adjournment on January 8, 2015 and the status hearing was rescheduled to June 19, 2015 to allow Mr. Drapeau to deal with his family health issues.

[54] On June 19, 2015, we proceeded with the status hearing and vacated the stay as the issue of reasonable apprehension of bias no longer existed given that the Tribunal is independent of the Commission in its adjudicative functions and Tribunal members are not members of the Commission. The dates for the hearing on the merits were chosen at the end of the status hearing as October 5-6, 26-27 and November 24-25, 2015.

[55] We issued our written reasons for vacating the stay on August 27, 2015.

[56] On September 28, 2015, Armel Drapeau filed a motion seeking leave to appeal our August 27, 2015 decision to the Court of Appeal.

[57] Given the leave to appeal motion, we cancelled the October 5 and 6 hearing dates, but maintained the October 26-27 and November 24-25, 2015 hearing dates.

[58] On October 16, 2015, the Court of Appeal refused Mr. Drapeau leave to appeal.

[59] On October 20, 2015, Mr. Drapeau requested that the hearing on the merits be adjourned to allow him to retain a lawyer. The Commission and Mr. Emond consented to this request. We granted this adjournment and the hearing on the merits was adjourned to November 24-25, 2015 with further dates to be scheduled as needed.

[60] The hearing on the merits was to begin on November 24, 2015. On November 23, 2015, Mr. Drapeau requested a further adjournment to pursue his efforts to find a lawyer. Again, the Commission and Mr. Emond consented to this request. This motion was heard on November 24, 2015 and Mr. Drapeau detailed the significant efforts he had made to retain a lawyer. We granted the adjournment as the initial adjournment granted was insufficient in light of Mr. Drapeau's efforts to find a lawyer.

[61] At the end of the November 24, 2015 hearing of the motion, the hearing on the merits was rescheduled to May 2-6, 2016.

[62] Mr. Drapeau finally retained I. Gérald Lévesque to represent him.

[63] On April 22, 2016 solicitor Lévesque filed a motion seeking to change the location of the hearing from Saint John to Edmundston as the majority of witnesses lived in the Edmundston area. The Commission and Pierre Emond consented to this motion. On April 26, 2016, we granted this motion.

[64] On April 25, 2016, the Commission filed a motion seeking an adjournment of the hearing on the merits on the basis that its witness, Ed LeBlanc, would be delayed in his return from Florida and would not be available at the start of the hearing. We denied this request.

[65] On April 26, 2016, the Commission requested a reconsideration of our decision to refuse the adjournment. We did not consider this request as we informed the parties on April 27, 2016 that we would only deal with the preliminary matters on May 2, 2016 as these preliminary matters could

render the hearing on the merits moot.

[66] Pierre Emond has not filed a single motion.

IV. ANALYSIS

[67] For the reasons that follow, we are of the view that these proceedings must be dismissed against Pierre Emond and Armel Drapeau.

[68] We mention at the outset that the parties did not file Affidavits in support of their preliminary matters. The parties also did not testify at the hearing of the preliminary matters. In addition, Mr. Emond participated in the preliminary matters by teleconference as he lives in Chicoutimi in the Province of Québec.

[69] Subsection 38(6) of the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c. 30 sets out the Tribunal's authority in relation to receiving evidence. It allows for more flexibility than in civil proceedings and provides:

> 38(6) The Tribunal may receive in evidence any statement, document, record, information or thing that, in the opinion of the Tribunal, is relevant to the matter before it, regardless of whether the statement, document, record, information or thing is given or produced under oath or would be admissible as evidence in a court of law.

[70] On the basis of subsection 38(6), we allowed the parties to provide evidence not under oath and advised the parties that we would afford this evidence the weight we found appropriate.

[71] We considered the evidence from the following in reaching our decision:

- The pleadings and motions previously filed in these proceedings;
- The orders, decisions, and notices previously issued in these proceedings;
- The oral arguments of Pierre Emond;
- The oral arguments of Armel Drapeau and his solicitor;
- The oral arguments of Brian Maude, solicitor for the Commission;
- The written submissions of the Commission filed on April 29, 2016;
- The written submissions of Armel Drapeau filed on May 2, 2016;
- The additional submissions of the Commission provided on June 7, 2016; and
- The additional submissions of Armel Drapeau provided on June 10, 2016.

A. DENIAL OF PROCEDURAL FAIRNESS

1. Legal Principles

[72] The leading decision on a stay of proceedings for unreasonable delay is *Blencoe v. British Columbia (Human Rights Commission,* [2000] 2 SC.R. 307 [*Blencoe*]. In that matter, the Supreme Court of Canada confirmed that a stay is available for inordinate delay that compromises the fairness of the hearing or amounts to an abuse of process. The key principles gleaned from that decision in relation to procedural fairness are:

1. Delay, in and of itself, does not justify a stay of proceedings. A stay may be warranted where undue delay impairs the fairness of the hearing [paragraph 101].

2. The delay must be unreasonable or inordinate [paragraph 121].

3. A stay of proceedings is justified when the delay causes a prejudice to the fairness of the hearing and affects the ability of a party to defend itself, such as when the parties or witnesses' memories have faded, essential witnesses have died or are unavailable, or evidence has been lost [paragraph 102].

4. To determine whether a delay is inordinate, it must be analyzed according to contextual factors such as: (1) the nature of the case and its complexity; (2) the facts and issues; (3) the purpose and nature of the proceedings; (4) whether the respondent contributed to the delay or waived the delay; and (5) other circumstances of the case. The purpose of this analysis is to determine whether the community's sense of fairness would be offended by the delay [paragraph 122].

[73] Decisions subsequent to *Blencoe* confirm that delay alone, without proof of prejudice, does not justify a stay of proceedings. In *Stinchcombe v. Law Society (Alberta)*, 2002 ABCA 106, the Alberta Court of Appeal elaborates on the fairness of the hearing:

> 44 The principles of natural justice demand that a person appearing before a tribunal have the right to make full answer and defence. The *audi alteram partem* rule, one aspect of the right to make full answer and defence, requires that a fair opportunity be given to "those parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view": *Education Board v. Rice*, [1911] A.C. 179 (U.K. H.L.), at 182, adopted in *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 (S.C.C.), at para. 38. The first question is, was there an inordinate delay? Second, did it result in prejudice to the right to make full answer and defence of sufficient significance to justify a stay?

2. Application of Principles

[74] For the reasons set out below, we are of the view that the delay in these proceedings constitutes a breach of the requirement for procedural fairness as it is inordinate, it results in significant prejudice and it is no longer possible for Mr. Emond and Mr. Drapeau to have a fair hearing.

(a) Inordinate Delay

[75] We find the delay with respect to both Armel Drapeau and Pierre Emond is clearly inordinate.

(i) Length and Causes of the Delay

[76] We find the overall delay is clearly inordinate. The overall delay from receipt of the complaint to present is approximately 10 years. A closer examination of the delay shows that it can be broken down into two periods, being the delay in instituting the proceedings and the delay after the proceedings are commenced.

[77] The Commission argues that Mr. Drapeau has caused the vast majority of the delays in these proceedings. Mr. Drapeau acknowledges that he caused delays in these proceedings, however he argues that some delay is also attributable to Staff of the NBSC, the NBSC hearing panels or the Tribunal hearing panel. We find that the delay in these proceedings is attributable to Staff of the NBSC, Armel Drapeau, and the hearing panels. Pierre Emond did not cause nor contribute to the delay.

Delay in instituting proceedings

[78] According to the Second Amended Statement of Allegations filed by Staff of the NBSC on December 6, 2012, the conduct of Pierre Emond giving rise to these proceedings occurs between March 2006 and January 2008. As for Armel Drapeau, his alleged conduct occurs between October 2006 and March 2008 and again between December 2008 and January 2009.

[79] Mr. Emond stated during the hearing of the preliminary matters that the NBSC's investigator, Ed LeBlanc, had in his possession the first loan agreement he concluded in 2006 within a month of that agreement being signed.

[80] Although we have no concrete evidence as to when the NBSC begins its investigation in relation to Pierre Emond, we are satisfied that this investigation likely occurred in 2006 or 2007, given that the NBSC had the loan agreement in 2006.

[81] Mr. Emond states that for two years the NBSC had this first contract and did nothing, which led him to believe that his actions were legal. He maintained this belief until the NBSC requested that he sign the undertaking in 2008 to not trade in any securities.

[82] Mr. Drapeau indicates in his written submissions that the NBSC begins its investigation into his conduct in April 2007.

[83] On February 15, 2008, the NBSC obtains an undertaking from Mr. Emond not to trade in any securities.

[84] On May 20, 2008, the NBSC obtains an undertaking from Armel Drapeau not to trade in the securities of CTIC.

[85] On August 19, 2009, Staff of the NBSC files a preliminary motion seeking temporary orders prohibiting Mr. Emond and Mr. Drapeau from prevailing themselves of exemptions under New Brunswick securities law.

[86] Mr. Emond and Mr. Drapeau consent to these temporary orders and they are issued by an NBSC hearing panel on September 21, 2009.

[87] Staff of the NBSC only files its Statement of Allegations setting out the allegations against Mr. Emond and Mr. Drapeau on June 24, 2010.

[88] In his additional submissions filed on June 10, 2016, Mr. Drapeau alleges that the delay in commencing the proceedings against himself and Mr. Emond was as a result of the NBCS's decision to await the outcome of an investigation by Québec's Autorité des Marchés Financiers [AMF].

[89] We find there was a delay of approximately three years between the start of the NBSC's investigation into the actions of the Respondents and the start of these proceedings by the filing of the motions seeking temporary orders.

[90] In addition, there is a delay of approximately four years between the NBSC's knowledge of the loan agreements and the filing of the Statement of Allegations, which details the allegations against Mr. Emond and Mr. Drapeau.

[91] The Commission has not presented any evidence indicating that it could not have started these proceedings at an earlier date. It has not provided any evidence indicating that the investigation was complex and required nearly four years. Rather, the only evidence we have regarding the delay is that the NBSC was awaiting the outcome of the AMF's investigation.

[92] This matter has similarities with *Stinchcombe v. Law Society (Alberta)* 2002 ABCA 106 and *MacPhee v. Barristers' Society (New Brunswick)*(1983), 5 Admin L.R. 240 (N.B.Q.B.).

[93] In *Stinchcombe*, a delay of seven years in the presentation of formal charges by the Law Society was found to be inordinate.

[94] In *MacPhee*, there was a delay of 10 years between the alleged misconduct of the respondent and the proposed dates for the inquiry or hearing on the merits. Part of the delay was attributable to awaiting the outcome of criminal proceedings. A further 22 month delay was attributable to the Barristers' Society's preparation for the inquiry. The evidence was that there were 6,000 pages of transcript from the preliminary hearing which needed to be reviewed along with 1,550 exhibits which made the matter complex. The Court found there was no explanation regarding this delay and no specific explanation on what might be considered a reasonable length of time to prepare and conduct the inquiry. The Court found the 10 year delay unreasonable and not justified.

[95] It is possible, as happened here, that a registrant or person is subject to an investigation or enforcement proceedings in more than one jurisdiction. While cooperation between jurisdictions is to be encouraged, NBSC Staff could have proceeded with its investigation and the institution of enforcement proceedings while the AMF's proceedings were outstanding. It is the master of its own process and its choice to not proceed caused delay in the institution of the proceedings which contributed to the inordinate delay.

Delay after Proceedings Commenced

[96] We identify ten periods of delay between the filing of the Statement of Allegations and the hearing of the preliminary matters on May 2, 2016. These periods of delay range from two days to twelve months. The sum of these delays totals five years and nine months.

[97] We turn now to our analysis of the ten periods of delay.

Delays Attributable to Hearing Panels

[98] A significant period of delay is attributable to the hearing panels assigned to this proceeding. Those delays are as follows:

- June 24, 2010 – April 19, 2011: delay of 10 months. This delay is from the date of filing the Statement of Allegations to the date the hearing on the merits is originally scheduled to begin. During this time, a pre-hearing conference is held on November 22, 2010. At the pre-hearing conference, it is determined that 8 days will be required for the hearing on the merits and April 19-21, May 9-11, and May 16-17, 2011 are chosen for the hearing. Given the proposed length of the hearing, the delay of 5 months is required to comply with procedural requirements under Local Rule 15-501 *Procedures before a Panel of the Commission*, namely the filing of a Response by Armel Drapeau, pre-hearing disclosure of documents, requesting Summons to Witness, preparing witness lists and witness summaries, drafting pre-hearing submissions, determining any pre-hearing motions, and preparing for the hearing on the merits. We find this delay is reasonable to ensure the parties can adequately prepare for the hearing on the merits.

- April 21, 2011 – May 6, 2011: delay of 2 weeks. This is the delay between the hearing of Mr. Drapeau's motion seeking disclosure, challenging the redactions in the Affidavits of Ed LeBlanc, and arguing the NBSC was estopped and the issuance of the hearing panel's decisions on May 2, 2011 in relation to disclosure and on May 6, 2011 in relation to informer privilege. We find this delay is reasonable.

- May 9, 2011 – August 18, 2011: Delay of 3 months. The hearing panel hears Mr. Drapeau's motion regarding the *Charter* challenge on May 9, 2011. It issues its decision on August 18, 2011. This delay of three months is not inexcusable given the allegations of breach of the *Charter*, the time required for deliberations and drafting the decision.

- August 23, 2012 – January 2, 2013: Delay of 4 months. On August 23, 2012, the Court of Appeal issues its decision overturning the hearing panel's decision on informer privilege. On October 1, 2012, the Office of the Secretary sets new dates for a 6-day hearing on the merits. With respect to the delay of 5 weeks in scheduling the hearing, time must be allowed to contact the parties and the panel members to obtaining availability. The hearing is scheduled for January 8-10 and 15-17, 2013. The delay of 3 months between the scheduling of the hearing and the hearing dates is reasonable and necessary to allow the parties to prepare for the hearing on the merits.

- February 5, 2013 – April 17, 2013: Delay of 2.5 months. Mr. Drapeau files his motion seeking a stay of the proceedings on February 5, 2013. The motion is heard on April 17, 2013. Ideally, this delay could have been shorter. However, we do not find this delay inexcusable. Some delay is required between the filing of the motion and its hearing to enable the responding party to file Affidavit evidence and allow the parties to file submissions. In addition, some delay may also be attributable to the availability of the parties and the panel.

- April 17, 2013 – August 27, 2013: Delay of 4.5 months. This delay is associated with the Tribunal writing its decision on the stay motion. However, on August 7, 2013, the Commission advises that it no longer opposes the motion and this results in the stay motion being granted.

- August 27, 2013 – August 27, 2014: 12 months. This delay is attributable to the stay of proceedings ordered on August 27, 2013.

- August 27, 2014 - December 15, 2014: 3 months. Stay of proceedings maintained while the Tribunal awaits status updates from the parties. A Notice of Status Hearing is finally issued on

November 26, 2014 setting December 15, 2014 for the status hearing. There is no real justification for this delay.

- June 19, 2015 – October 6, 2015: Delay of 3.5 months. The Tribunal vacates the stay on June 19, 2015 and sets the dates for the hearing on the merits as October 5-6, 26-27 and November 24-25, 2015. The Tribunal drafts its reasons for decision vacating the stay and these reasons are issued on August 27, 2015.

- April 27, 2016 – present: The Tribunal advises the parties that the hearing on the merits is adjourned given that the disposition of the preliminary matters may render it moot.

[99] The delays attributable to the hearing panels total in excess of 43 months. Aside from the stay of proceedings, these delays are all associated with activity such as scheduling hearings, deliberations, and decision writing. Other than the stay, there was no other significant period of inactivity by the hearing panels.

Delays Attributable to Mr. Drapeau

[100] As for Mr. Drapeau, we find he is responsible for 14 months of delay in these proceedings.

[101] Mr. Drapeau has caused the delays detailed below in these proceedings.

- April 19, 2011 – April 21, 2011: Delay of 2 days. Mr. Drapeau files a motion on March 29, 2011 seeking (1) disclosure; (2) justification for redactions in the Affidavits of Ed LeBlanc; (3) dismissal of the proceedings on the basis of lack of impartiality or independence as required by the rules of natural justice and/or the *Charter*; and (4) dismissal of the proceedings on the basis of estoppel. Given that the hearing on the merits was scheduled to being on April 19, 2011, the delay associated with this motion starts to run on April 19, 2011. The delay imputable to Mr. Drapeau ends on April 21, 2011 when part of his motion is heard. We previously found that the other delay associated with this motion is attributable to the hearing panel.

- January 2, 2013 – February 5, 2013: Delay of 1 month. This delay surrounds the time Mr. Drapeau first indicates he will file a motion seeking a stay to the date he files his motion on February 5, 2013. When Mr. Drapeau indicates he will be filing a motion, the hearing on the merits dates is adjourned. Pierre Emond and Staff of the NBSC ultimately consent to the stay. As previously indicated, the other delays associated with this motion are attributable to the hearing panels.

- December 15, 2014 – June 19, 2015: Delay of 6 months. Mr. Drapeau requests adjournments of the status hearing regarding the stay due to family health issues. Mr. Emond and the Commission consent to these requests for adjournments.

- October 6, 2015 – May 2, 2016. Delay of 7 months. On September 28, 2015, Mr. Drapeau files his motion seeking leave to appeal the Tribunal's decision vacating the stay, which pushes back the start of the hearing on the merits to October 26, 2016. On October 20, 2015, Mr. Drapeau requests an adjournment of the hearing on the merits to find a lawyer. This pushes back the start of the hearing on the merits to November 24, 2015. On November 23, 2015, Mr. Drapeau

requests a further adjournment to pursue his efforts to retain a lawyer. The hearing on the merits is rescheduled to May 2-6, 2016. Again, Mr. Emond and the Commission consent to these requests for adjournments.

[102] While it is true that Mr. Drapeau contributed directly to the delay by filing numerous motions, he was successful on all these motions, with the exception of the first motion he filed on March 29, 2011. The Commission conceded at the hearing of the preliminary matters that in filing these motions, Mr. Drapeau was asserting his rights. We agree. There is no evidence that Mr. Drapeau filed frivolous motions nor that he had a vexatious purpose.

Delay Attributable to Pierre Emond

[103] As for Pierre Emond, we find that he has neither caused nor contributed to the delay in these proceedings. He did not file a single motion – he was simply along for the ride.

[104] To the contrary, we find that Mr. Emond has actively tried to disengage himself, perhaps to his own detriment, from these proceedings since at least 2012. In 2012, he signed a Settlement Agreement and in 2015, he signed an Agreed Statement of Facts. Mr. Emond also indicated during the hearing of the preliminary matters that it was his understanding that by signing the Settlement Agreement and the Agreed Statement of Facts that the proceedings against him would come to an end.

Delay Attributable to Mr. A

[105] A further delay of approximately 12 months from August 18, 2011 to August 23, 2012 is attributable to Mr. A surrounding the appeal of the hearing panel's decision on informer privilege. Much of the delay surrounding this appeal is attributable to time required to hear the appeal and time required by the Court of Appeal to render its decision. Mr. A is not a party to these proceedings and as such the delay he occasioned in these proceedings cannot be imputed to either to hearing panels or to Staff of the NBSC. In addition, we do not find this delay inexcusable as the Court of Appeal ultimately allowed the appeal and overturned the hearing panel's decision on informer privilege. Nonetheless, this delay adds to the cumulative delay of seven years.

Overall Delay

[106] In our view, in analyzing the length of the delay, we cannot restrict our analysis to the delays caused by the various parties and the hearing panels. A broader analysis is required. As stated in *Stinchcombe* at paragraph 48:

> 48 The length of the period of time between the initial action and the actual hearing is a factor to consider in determining whether a delay is inordinate or unreasonable: see Bastarache J. in *Blencoe*, at paras. 109-115, *Misra v. College of Physicians & Surgeons (Saskatchewan)* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.), at 492-493. The court must also consider whether there was any activity during the delay that might explain the delay: Bastarache J. in *Blencoe*, at para. 132. The delay in each case should also be compared to the length of time taken by administrative tribunals in analogous cases: *ibid.*, at para. 130.

[107] This is not a matter where there has been no activity since the start of the proceeding. As detailed above, there have been periods of inactivity and periods of activity. Some of the delays are attributable to the filing and consideration of various motions, the drafting of decisions or the scheduling of hearings. In that respect, this matter can be distinguished from much of the caselaw which deals mostly with periods of complete inactivity.

[108] That being said, we are convinced that the cumulative delay of approximately ten years since the initial complaint to the NBSC is inordinate.

[109] Most of the caselaw where delays were found to be inordinate involve shorter delays than that of these proceedings. We cite as examples:

- *Misra v. College of Physicians & Surgeons (Saskatchewan)*(1988), 70 Sask. R. 116: A delay of five years in proceeding with a hearing on the merits while awaiting the outcome of criminal proceedings and while the physician was subject to a temporary suspension of 5 years was an unreasonable delay.

- *Stinchcombe v. Law Society (Alberta)* 2002 ABCA 106: A lawyer was suspended from the practice of law pending a hearing on the merits. Delays of twelve years and fourteen years respectively were found to be unreasonable.

- *Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [1994] B.C.J. No. 2037: A delay of just over three years was found to be unreasonable.

- *Kodellas v. Saskatchewan (Human Rights Commission)* (1989), 77 Sask. R. 94: A delay of four years was found to be unreasonable.

- *Investment Dealers Association of Canada v. MacBain* (2007), 299 Sask. R. 122 (Sask. C.A.): A delay of three years and eight months between the commencement of the investigation and the commencement of the proceedings and seven years overall was found to be unreasonable.

[110] Our finding that a ten year delay is inordinate is supported by the caselaw.

(ii) Purpose of the Proceedings

[111] We find the purpose of these proceedings does not justify the delay. The purpose of these proceedings is to determine whether Pierre Emond and Armel Drapeau breached the *Securities Act.*

[112] The mandate of the NBSC and its successor, the Commission, as recognized in the *Securities Act* is in part to "provide protection to investors from unfair, improper or fraudulent practices". Given this public interest mandate, it is imperative that enforcement proceedings proceed as fairly and expeditiously as possible.

[113] In addition, unlike the case of a human rights commission such as that considered in *Blencoe,* these enforcement proceedings will not provide direct redress to the investors in the CTIC or CITCAP loan agreements.

[114] The Commission seeks the following relief in its Second Amended Statement of Allegations: (1) permanent cease trade orders against Mr. Drapeau and Mr. Emond, (2) an order that the exemptions

in New Brunswick securities law do not apply to Mr. Drapeau and Mr. Emond, (3) disgorgement of the amounts obtained as a result of non-compliance with New Brunswick securities law, and (4) administrative penalties. There are no compensation claims by the investors, which would provide direct redress to these investors.

[115] This lack of redress to victims is an important consideration as set out in *Stinchcombe* at paragraph 55:

> 55 [...] The availability of redress is not affected by staying the disciplinary proceedings. While there is a public interest involved, that public interest was addressed with a suspension. The very real interest of the suspended member must also be considered. The suspension is very onerous, with serious consequences to the member, and requires the Law Society to proceed without delay unless the delay is clearly waived by the member. Neither the nature nor the purpose of the Law Society proceedings justified the delay in this case."

[116] Consequently, staying these proceedings will not affect the availability of redress for the investors.

[117] In *Stinchcombe v. Law Society of Alberta*, 2002 ABCA 106, a period of 14 years had elapsed since the filing of the complaint. The Law Society temporarily suspended Mr. Stinchcombe from the practice of law pending the outcome of criminal proceedings. The Court states regarding the purpose of the disciplinary proceedings and the temporary suspension:

> [55] Moreover, unlike the case of a human rights commission such as that considered in *Blencoe,* Law Society disciplinary proceedings do not provide direct redress to the victim. The availability of redress is not affected by staying the disciplinary proceedings. While there is a public interest involved, that public interest was addressed with a suspension. The very real interest of the suspended member must also be considered. The suspension is very onerous, with serious consequences to the member, and requires the Law Society to proceed without delay unless the delay is clearly waived by the member. Neither the nature nor the purpose of the Law Society proceedings justified the delay in this case.

[118] As in the *Stinchcombe* and *Misra* matters, Mr. Emond and Mr. Drapeau have been subjected to temporary orders prohibiting them from prevailing themselves of the exemptions under New Brunswick securities law since September 21, 2009. In addition, they are also subject to undertakings not to trade in securities since 2008. Those temporary orders and undertakings are very onerous and have serious consequences for Mr. Emond and Mr. Drapeau. The public interest was addressed with these temporary orders.

[119] We share the court's opinion in *Stinchcombe* that a suspension or a temporary order requires the hearing panel to proceed expeditiously. In that light, the almost seven year delay since the granting of the temporary orders is unacceptable.

(iii) Nature of the Case, Its Complexity and Facts and Issues

[120] We find the nature of this case, its complexity, and facts and issues do not justify the delay in these proceedings.

[121] These proceedings are enforcement proceedings alleging breaches of the *Securities Act* by Pierre Emond and Armel Drapeau.

Investigation

[122] The limited evidence reveals that NBSC Staff was awaiting the outcome of the AMF's investigation before instituting proceedings against Mr. Emond and Mr. Drapeau.

[123] There is no evidence that the delay of approximately three years in filing the motions seeking temporary orders and four years in filing the Statement of Allegations is attributable to the complexity of the investigation.

[124] There is no evidence that NBSC Staff could not have proceeded with the institution of proceedings at an earlier date.

The Proceedings

[125] We find the allegations against Pierre Emond and Armel Drapeau are not complex.

[126] With respect to Pierre Emond, the allegations are straightforward. The Commission alleges that he (1) traded in securities without being registered contrary to paragraph 45(a) of the *Securities Act*; and (2) he breached subsection 71(1) of the *Securities Act* as no prospectus was filed for the CTIC distribution nor was it done in compliance with an exemption from the prospectus requirement.

[127] As for Armel Drapeau, the Commission alleges that:

a) He breached subsection 71(1) of the *Securities Act* for the same reasons as Mr. Emond;

b) He breached paragraph 45(a) of the *Securities Act* as his distributions were not carried on for the account of and through the facilities of his registered dealer Investia;

c) He breached section 2.9 of National Instrument 45-106 as he failed to file a report of exempt distribution in relation to certain CITCAP distributions;

d) He made misrepresentations to NBSC Staff contrary to paragraph 179(2)(a) of the *Securities Act* when he stated that he was only involved in the distribution to one CITCAP investor; and

e) He was paid, or was to be paid a commission of 5% in connection with the CITCAP distribution, in contravention of section 2.9(6) of NI 45-106.

[128] The registration or non-registration of a person and the filing or non-filing of a prospectus or report of exempt distribution are easily established by a certificate of the Executive Director of Securities provided pursuant to subsection 196(1) of the *Securities Act*. That paragraph provides that the certificate of the Executive Director is admissible in evidence and is, in the absence of evidence to the contrary, proof of the facts stated in the certificate.

[129] With respect to the further allegations against Mr. Drapeau, they do not involve great legal complexity.

[130] That being said, the multiplicity of motions and the length of the hearing in this matter do entail a certain complexity. We note:

- There have been at least 10 motions filed in these proceedings, which have occasioned delays and added to the complexity of this case.
- There have also been two motions for leave to appeal to the Court of Appeal, one of which resulted in a full appeal.
- The documentary disclosure is voluminous. Both Mr. Drapeau and Mr. Emond mentioned disclosure of 15,000 pages.
- At various times, the hearing on the merits was scheduled for between five and eight days.

[131] We conclude that the voluminous disclosure, the multiplicity of motions, and the time scheduled for the hearing do not justify the delay of almost seven years since the commencement of the proceedings.

(iv) Waiver of Delay

[132] The Commission argues that while Mr. Emond did not contribute to the delay, he did nothing to accelerate these proceedings and did not oppose any of the motions filed and as such he may have waived the delay. We reject that argument. We find that Pierre Emond did not waive the delay in these proceedings.

[133] As stated in *Stinchcombe v. Law Society of Alberta,* 2002 ABCA 106 at par. 58, a respondent does not bear the onus of moving an administrative proceeding ahead and silence does not constitute waiver. A waiver of delay must be "informed and unequivocal" [paragraph 47].

[134] There is no evidence that Pierre Emond took any action to waive the delay in an informed and unequivocal manner. His lack of opposition to motions filed by the other parties does not constitute waiver. In addition, as previously discussed, Mr. Emond has been actively trying to put an end to these proceedings since 2012.

(b) Significant Prejudice

[135] We are of the view that Mr. Emond and Mr. Drapeau's ability to answer the allegations against them has been impaired as a result of the delay. In our view, the delay in these proceedings will seriously prejudice Mr. Emond and Mr. Drapeau's ability to make full answer and defence and it is no longer possible for them to have a fair hearing.

[136] We are mindful of the Supreme Court's decision in *Blencoe* that in order to stay proceedings for delay, there must be proof of significant prejudice which results from the unacceptable delay. In our view, there is sufficient proof of significant prejudice resulting from the unacceptable delay to warrant a dismissal of these proceedings as against Pierre Emond and Armel Drapeau.

(i) Pierre Emond

[137] We find that Pierre Emond will sustain significant prejudice as a result of the unacceptable delay in these proceedings should the hearing on the merits proceed.

[138] One of the Commission's witnesses has died.

[139] Mr. Emond argued at the hearing of the preliminary matters that it is impossible for him to defend himself as too much time has passed and his ability to recollect events has faded or disappeared. Given the delay of approximately 10 years since the initial complaint, we accept this argument.

[140] Given that approximately 10 years has passed since the initial complaint was received by the NBSC, it is also probable that witnesses' memories have faded and that this could have an impact on their credibility. Courts made such findings in *Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia),* [1994] B.C.J. No. 2037 and *Stinchcombe.*

[141] In our view, the greater the passage of time, the greater the probability of an impact on witnesses' memories and the fairness of the hearing.

[142] We are also concerned that as a result of the delay in these proceedings, Mr. Emond has chosen to no longer fully participate in these proceedings. In our view, he has become disinterested.

[143] While Mr. Emond has not provided concrete evidence of prejudice other than the impact on his memory, such as deceased witnesses or lost evidence, we are satisfied that the impact of the delay on his memory is sufficient to seriously prejudice his ability to make full answer and defence. It is no longer possible for Mr. Emond to have a fair hearing.

(ii) Armel Drapeau

[144] We also conclude that Armel Drapeau will sustain significant prejudice as a result of the unacceptable delay in these proceedings.

[145] Mr. Drapeau alleges that should the hearing proceed he will be unable to make full answer and defence for the following reasons:

- Generally speaking, witnesses memories will have faded given the passage of time;
- One of the Commission's witnesses is dead;
- Four of his witnesses have died;
- Evidence has been lost, namely two cassette recordings of statements provided by Mr. Drapeau – although the paper transcripts of these statements exist.

[146] The loss of the cassette recordings of statements provided by Mr. Drapeau was raised in Mr. Drapeau's motion filed on March 29, 2011 and addressed in the hearing panel's decision issued April 29, 2011. At paragraph 10 of that decision, the hearing panel summarizes the issue as follows:

> [10] In early 2011, counsel for Drapeau requested the audio-recordings of the interviews to confirm the accuracy of the transcripts. Staff provided the audiorecordings of two of the four interviews; however the audio-recordings of the other two interviews were not remitted to Drapeau. These interviews, conducted on 12 June 2008 and 20 March 2009, were recorded and transcribed by Henneberry Reporting Service. The uncontested affidavit evidence indicates that the audio recordings for these interviews were recycled after the transcripts were prepared, as is the practice of Henneberry Reporting Service, and all existing audio deleted.

[147] Mr. Drapeau also argues that the change in the panel members causes him a serious prejudice as during a hearing, we cannot rely solely on written documents, as these do not provide the full dynamic. According to Mr. Drapeau, given the voluminous documentation, the new panel will not have a complete comprehension of the matter.

[148] We note that the change in hearing panels was required pursuant to paragraph 9(9) of Local Rule 15-501 due to the failure of the original hearing panel to approve the Settlement Agreement concluded between NBSC Staff and Pierre Emond. That paragraph states:

> **9(9) Constitution of subsequent Panel** – Where any Settlement Agreement is not approved, no member of the Settlement Panel shall be a part of the Panel at a subsequent hearing in the Proceeding, except with the prior consent of the Parties to the Settlement Agreement.

[149] Mr. Drapeau also alleges lack of impartiality on behalf of the panel. This issue is *res judicata* as it was dealt with and rejected in the decision *Emond, Re*, 2011 NBSECE 4 (CanLII). We again dealt with this issue in our August 27, 2015 Decision vacating the stay in these proceedings which is reported as *New Brunswick (Financial and Consumer Services Commission v. Emond and Drapeau*, 2015 NBFCST 6 (CanLII).

[150] We are satisfied that the delay in these proceedings has prejudiced Mr. Drapeau's ability to make full answer and defence such that he would not receive a fair hearing.

B. ABUSE OF PROCESS

[151] We conclude that to continue with these proceedings would constitute an abuse of process. In our view, this is one of those rare cases where a stay of proceedings is justified as the proceedings have become oppressive and to continue would tarnish the integrity of the Tribunal.

1. Legal Principles

[152] In *Blencoe,* the Supreme Court recognizes that unacceptable delay may constitute an abuse of process in certain circumstances even where the fairness of the hearing is not compromised. The Court states that the delay must still cause "actual prejudice of such magnitude that the public's sense of decency and fairness is affected." [par. 133] Justice Bastarache recognizes that a delay causing significant psychological harm or significant harm to a person's reputation can be an abuse of process. It states at paragraph 115:

> 115 I would be prepared to recognize that unacceptable delay may amount to an

abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute.

[153] The majority of the Supreme Court finds that the principles of abuse of process applicable to criminal proceedings are equally applicable in administrative law. Justice Bastarache comments on the purpose of the doctrine of abuse of process in the following excerpt:

> 119 In *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667, L'Heureux-Dubé J. explained the underlying purpose of the doctrine of abuse of process as follows:
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> > Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, *supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, 1981 CanLII 23 (SCC), [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]
>
> 120 In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at

p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[154] A very good example of a stay of proceedings due to an abuse of process is *Misra v. College of Physicians & Surgeons (Saskatchewan)*, 1988 70 Sask . R. 116. Although this case precedes *Blencoe*, it was cited with approval in *Blencoe* as an example of abuse of process.

[155] Mr. Misra was suspended temporarily from practicing medicine pending the hearing by the College of Physicians and Surgeons. The suspension had been in effect for five years and the hearing had not yet occurred. The College was awaiting the outcome of criminal proceedings before continuing with its disciplinary proceeding. Mr. Misra argued that if the proceeding was allowed to continue it would be unfair and inequitable. He argued that allowing the inquiry to proceed would be an abuse of process which would likely result in a denial of justice and that further proceedings would be tantamount to persecution given the temporary suspension of five years.

[156] Despite the fact that no concrete evidence was introduced regarding breach of procedural fairness, the Court concluded that Mr. Misra's ability to defend himself would be compromised and that his five-year suspension had already served as punishment. The following excerpt from the decision discussed the prejudice sustained by Mr. Misra and the oppressive nature of the proceedings.

> 43 The position of the respondent in this case is that it did the proper thing in "respectfully standing by" while the case made its way through the criminal courts. However, it did far more than "respectfully stand by". It suspended the appellant from practice. That is equivalent to imposition of the most severe penalty which it is entitled to impose under the terms of the Act, save and except for a fine of $5,000, which is something far less severe than a suspension from practice.
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> [...]
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> 45 [...] It will be more difficult for him to defend because five years have elapsed since the events occurred. He has undergone, through that period, the usual stress, anxiety and expense involved in such matters. The charges do allege matters criminal in nature and his reputation in the community will have suffered. He has, for approaching six years, been deprived of the right to practise his profession, although he has not yet been found guilty of any offence. His income from that source has been forever lost and it may be assumed that whatever practice he had was severely damaged, if not destroyed. Yet he is being required to defend himself on charges arising from the same events which gave rise to his five-year suspension.
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> 46 These are all matters which arose because of the procedure used by the respondent (although in good faith). The circumstances have made the procedure clearly unfair and prejudicial to the appellant to the extent that they are oppressive and make it impossible to give him a fair hearing. The suspension can never be remedied if he is found not guilty of the charges. It is one thing to undergo a temporary suspension for a few months or even a year or two while waiting to be heard — five years is quite another matter.

[157] *Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia),* [1994] B.C.J. No. 2037,

involves the disciplinary proceedings of an engineer. Mr. Brown argued that a delay of more than three years was an unreasonable delay which caused him prejudice. In addition to the prejudice to the fairness of the proceedings, Mr. Brown alleged the delay caused the dissolution of his partnership, the loss of six months of income, injury to his reputation and the risk of losing an important client. Mr. Brown also alleged that the on-again / off-again nature of the proceedings caused him fear, frustration, anger, depression and loss of confidence. He also alleged that his ulcer worsened, he suffered sleep disorders and loss of concentration at work.

[158] The Court comments on the impact an inordinate delay can have on the normal tensions associated with disciplinary proceedings. The Court states at paragraph 59:

> 59 I am sure this matter has been a troubling one for the Petitioner. Allegations of the nature of those in this case against a professional person are serious and upsetting. The process of being the subject of complaints creates the type of tensions described in all persons who must endure the process although they differ in kind and degree from person to person. Delay of course exacerbates those problems, and that is the seriousness of unreasonable delay. Delay becomes therefore an aggravating factor difficult to quantify.

[159] The Court concludes that the Association had lost jurisdiction over Mr. Brown because of unreasonable delay. In the excerpt below, the Court states that the cumulative effect of injury may be such that a sanction is imposed without responsibility being established or an opportunity to be heard provided :

> 71 The prejudice here is not as serious as in *Misra*, *supra*, in that the Petitioner's right to practice has not been lost, however, there is evidence that the Petitioner's reputation amongst clients and colleagues may have suffered during the delay and it is unlikely that type of loss ever is fully restored. The cumulative effect of prejudice can be that a penalty is imposed upon a person by being kept under the disciplinary process for an inordinate time period without any guilt having been proven, or an opportunity afforded to the member to be heard. I find that has occurred here.
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> [...]
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> 73 [...] In effect, the Petitioner has been subjected to penalty without finding of guilt.

[160] In *Saskatchewan Human Rights Commission v. Kodellas* (1989), 77 Sask R 94 on pages 23 and 24, the Court comments on the prejudice suffered by Mr. Kodellas. The Court recognizes that the four year delay had extended the stigma or psychological trauma beyond the time period in which Mr. Kodellas would normally be required to bear these hurtful feelings if there had been no unreasonable delay. The court also states that it would be difficult for Mr. Kodellas to erase the stigma associated with the charges against him.

[161] In *Investment Dealers Association of Canada v. MacBain* (2007), 299 Sask. R. 122 (Sask. C.A.), a decision rendered after *Blencoe,* the Saskatchewan Court of Appeal comments on the type of prejudice sufficient to establish abuse of process. It states:

> [39] Even if the delay of three years and eight months caused by the IDA were not inordinate, the entire process is obviously grossly unfair to Mr. Smith. Guilty of any conduct warranting discipline or not, he should have had a hearing on the merits before the end of nearly seven years.
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> [...]
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> [41] While the circumstances of Mr. Smith are not quite as severe as those of Dr. Misra, who was barred from the practice of his profession during the four year delay, the effects upon his reputation, career and personal life, of the continuation of the prosecution for a period of seven years, and possibly several years more given the time needed for hearings and possible appeals, amounts in our view, to an abuse of process. His reputation was harmed by the bad publicity in 2000 to the extent that his new business dwindled from $12 million annually to zero within two years. By 2004, he had recovered new business levels to what they were previously, when the Notices of Hearing resulted in more negative publicity. We have no evidence as to what happened after 2004, but can infer that the results would have been the same as before, with a wave of more new bad publicity to come when the IDA resumes its proceedings now, if allowed to do so. This is the sort of harm contemplated by Bastarache J. in the above quotation. In our view, allowing continuation of the proceedings would bring the disciplinary system of the IDA into disrepute.

2. Application of Principles

[162] We turn now to our analysis of the components of abuse of process.

(a) Inordinate Delay

[163] We have already found the delay in this matter to be inordinate.

(b) Significant Prejudice

(i) Pierre Emond

[164] We find that the delay in this matter has caused significant prejudice to Mr. Emond that cannot be remedied should he be found not liable of the allegations.

[165] Mr. Emond has sustained significant personal and psychological prejudice as a result of the delay, namely:

- He declared bankruptcy in 2010;
- He separated from his wife;
- His reputation was marred to the point where he had to move to Québec to find employment;
- He contemplated suicide;
- A man beat his daughter because he thought there was money in the house;

- His wife and two of his children moved away from Edmundston as a result of the community treating them like pariahs ;
- He has been accused of participating in a Ponzi scheme and compared to Bernie Madoff and Earl Jones as a result of the NBSC's press release and the media's treatment of the press release.

[166] The impact on Mr. Emond was evident during the hearing of the preliminary matters. When discussing the impact on his family, he was in tears.

[167] He indicated at the hearing of the preliminary matters that he was crucified on the public place and that his debt was paid long ago.

[168] Mr. Emond argued it is inappropriate to judge people and to leave them hanging as has happened in this matter. We agree.

[169] Mr. Emond has already been subjected to a $12,000 fine by the AMF in relation to the loan agreements concluded with Quebec residents. He has been paying this fine in $100 monthly installments.

[170] As in the *Brown* and *Kodellas* matters, we find the lengthy delay in this matter has prolonged the stigma or psychological trauma beyond the time period in which Mr. Emond would normally be required to bear these hurtful feelings.

[171] We are particularly concerned that Mr. Emond has been subjected to a temporary order for almost 7 years. As was stated in *Stinchcombe*, the suspension (or a temporary order) is very onerous with serious consequences and requires the administrative tribunal to proceed without delay.

[172] In our view, the cumulative effect of the prejudice sustained by Mr. Emond is such that he was subjected to a penalty without a finding of guilt nor an opportunity to be heard.

(ii) Armel Drapeau

[173] We also find that the delay in this matter has caused significant prejudice to Mr. Drapeau which cannot be remedied should he be found not liable of the allegations.

[174] Mr. Drapeau has sustained the following prejudice:

- Loss of employment with Investia in 2009;
- He has not been able to find other gainful employment since 2009, other than government projects;
- He lost income, lost his pension savings, his savings, his savings for his children's education, and a rental property;
- Loss of book of business;
- There was a significant negative impact on his wife, children, parents, siblings and neighbours;
- As a result of the press releases of the NBSC, the Edmundston community believes he was involved in a Ponzi scheme and treated like a thief in his community;
- He suffered loss of appetite, trouble sleeping, depression, anxiety, stress and required medical care;

- He lost friends;
- Outings with his wife became almost non-existent given the community's reaction to him;
- He would go to the grocery store at 7 a.m. to avoid meeting people he knew; when he met someone he knew, the person would change aisles to avoid being seen with him;

[175] Mr. Drapeau also alleges that the effect on his reputation is permanent and the damage is irreparable. He will never be able to return to work as a mutual funds dealer.

[176] While some of the prejudices listed above are not directly related to the delay, we find that the delay has attached a stigma to Mr. Drapeau, which is irreparable. Mr. Drapeau lives in a small community and he has been effectively ostracized. In our view, the lengthy delay has significantly amplified the normal stress and stigma which would be associated with enforcement proceedings.

[177] As with Mr. Emond, we are particularly concerned with the impact the undertaking and temporary order have had on Mr. Drapeau. Mr. Drapeau is effectively unable to work in his chosen field since 2009.

(c) Delay brings the Human Rights System into Disrepute

[178] In our view, to continue with these proceedings would bring the human rights system into disrepute. We are satisfied that the damage to the public interest in the fairness of these proceedings should the hearing on the merits go ahead would exceed the harm to the public interest in the enforcement of the *Securities Act* if the proceedings are dismissed.

[179] Mr. Emond and Mr. Drapeau have been subjected to penalty by way of the temporary orders since September 21, 2009 without any finding of guilt and without an opportunity to be heard. As stated in *Stinchcombe,* a temporary order is very onerous with serious consequences and requires the administrative tribunal to proceed without delay. That did not happen here and to continue with these proceedings would tarnish the integrity of the Tribunal.

[180] We agree with the Court's sayings in *Misra* that "the suspension can never be remedied" if Mr. Emond and Mr. Drapeau are found not liable of the allegations. Mr. Emond and Mr. Drapeau both state that they have effectively been ostracized in their community. No matter the outcome of a hearing on the merits, this damage cannot be remedied.

[181] As for the public interest in the enforcement of the *Securities Act*, we simply state that if Mr. Emond and Mr. Drapeau are liable, they have been punished. The public interest was addressed with the undertakings and the temporary orders. Mr. Emond and Mr. Drapeau have both paid a significant price – both professionally and personally.

[182] We conclude that we have lost jurisdiction in these proceedings as a result of the unreasonable delay in these proceedings and the significant and irreparable prejudice to Mr. Emond and Mr. Drapeau.

C. UNREASONABLE DELAY ON THE BASIS OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

[183] In our view, given our conclusion on procedural fairness and abuse of process, it is not necessary to deal with Mr. Drapeau's argument that the delay in these proceedings violates section 7 and 11(b) of

the *Canadian Charter of Rights and Freedoms.* We are supported in this approach by other Canadian courts.

[184] Canadian courts have generally held that an unreasonable delay may constitute a breach of natural justice regardless of the rights under the *Charter of Rights and Freedoms*.

[185] In *Misra v. College of Physicians & Surgeons (Saskatchewan)*, 1988 70 Sask. R. 116, the Court stated that since Mr. Misra was successful on his arguments of breach of natural justice, it was not necessary to consider whether article 7 of the *Charter* was applicable. The following excerpt is determinative:

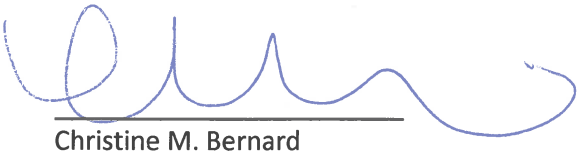
> 3 However, the appellant did maintain that s. 7 did apply to these proceedings and that it conferred, in a broader sense, the same protections outlined in s. 11. The appellant further argued that the requirement of s. 7 that the appellant be dealt with "in accordance with the principles of fundamental justice" was, in this case, identical to the requirement of the common law relating to administrative tribunals, that they act in accord with the principles of natural justice and procedural fairness. Since, as will be seen, the appellant is entitled to succeed on common law principles alone, it is unnecessary to consider whether s. 7 of the Charter applies.

[186] In *Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [1994] No. 2037 B.C.J. another disciplinary proceeding, Mr. Brown argued that the unreasonable delay caused him prejudice and that natural justice required the stay of proceedings. Mr. Brown also relied on Article 7 of the *Canadian Charter of Rights and Freedoms*. In refusing to deal with the *Charter* arguments, the Court stated that the *Charter* does not provide a broader remedy than that available in administrative law and therefore it was not necessary to address the applicability of the Charter.

V. DECISION AND ORDER

[187] For the reasons set out above, we have lost jurisdiction in these proceedings and the proceedings as against Pierre Emond and Armel Drapeau are dismissed.

DATED this 10th day of August, 2016.



Christine M. Bernard
Registrar
Signed for panel members Enrico Scichilone, Gerry Legere and Jean LeBlanc
pursuant to subsection 40(3) of the *Financial and Consumer Services Commission Act*